employment and the evidence that labourers in the factory habitually left or were dismissed without giving or receiving notice, a practice which must have been known to the plaintiff.

I do not think there is anything in these facts to displace the presumption. Payment of wages once a month is strong evidence that the agreement was for a period of one month and the fact that wages were reckoned at a daily rate is quite consistent with such an agreement. Sub-section (4) of section 8 clearly contemplates agreements of this type, and throws upon the employer in such a contract the burden of providing suitable work up to an aggregate of 24 days in each month or of paying the labourer wages up to an aggregate of 24 days.

In my view, the plaintiff's admission that he was engaged on a daily wage merely meant that his wages were to be calculated at a daily rate and is not sufficient to displace the statutory presumption.

Under section 9 either party to an agreement for a period of time, who wishes to terminate it, is bound to give the prescribed notice of such intention to the other party. The fact that this provision has been consistently broken by the defendants and by their employees appears to me to be irrelevant when, as in such a case as this, an employee wishes to take advantage of his rights under the law.

Mr. Handy also pointed out that if, in fact, the plaintiff's agreement was from day to day then the defendants have consistently broken section 10 of the Ordinance by paying him his wages once a month instead of daily or weekly.

No reason has been adduced by defendants for the dismissal and there being no allegation of misconduct on the part of the plaintiff he is entitled, under the provisions of section 12, to the maximum amount of wages the employer is bound to pay under section 8 (4).

My decision involves no hardship on the defendants for if they wish to engage labourers on daily agreements they can do so either by making specific agreements with their employees or by posting adequate notices in the factory to that effect.

There is a point of practice arising out of this suit to which I should draw attention. The action was brought by the Extra Assistant Controller of Labour as plaintiff for and on behalf of the labourer, whereas subsection (2) of section 42 authorises the Controller to institute proceedings "for and in the name of" a labourer or labourers. This might be of importance if the defendants in such a suit should secure an order for costs to be paid by the plaintiff. In my view the correct practice would be to intitule the action in the name of the labourer or labourers as the plaintiff or plaintiffs "by the Controller of Labour" in the same way as an infant sues or defends in his own name by his next friend or guardian. If the Controller institutes proceedings in his own name as plaintiff and is unsuccessful he may find himself made liable for the costs.

Order accordingly.

F. M. S. REPORTS.

FATIMAH BEE ALIAS BATCHA AMMAL vs. MOHIDEEN BATCHA, ATTORNEY OF SHAIK DAWOOD.

[App. Civil Jurisdiction (Terrell, Ag. C.J., F.M.S., McElwaine, C.J., S.S. and Aitken, Ag. J.A.) May 19, 1941]

Probate and Administration Enactment (Cap. 8) Sections 67, 77 and 85 — Rules for Non-Contentious Business, Rule 65 — Rules for Contentious Business, Rule 13 — Application for Letters of Administration — Caveat — Caveat warned — Appearance entered — Form of Appearance — Whether contentious suit commenced by entry of appearance — Whether Court has jurisdiction thereafter to grant Letters of Administration — Whether Court has jurisdiction to grant Letters of Administration if no estate exists in the Federated Malay States.

Petitioner applied for Letters of Administration of the estate of his mother. It did not appear that his mother had any estate in the Federated Malay States other than her share of her late husband's estate which she had purported to dispose of by deed of gift, shortly before her death to her daughter, Batcha Ammal. Petitioner wished to obtain Letters of Administration in order to dispute the validity of that gift. Batcha Ammal, the daughter, filed a Caveat. The Caveat was warned and an appearance was thereupon entered for Batcha Ammal. The appearance was not in the form provided in Rule 13 of the Rules for Contentious Business. Letters of Administration were nevertheless granted to the petitioner, the learned Judge holding that the Court had jurisdiction so to do as a contentious suit had not then commenced and the caveator had notice of the application.

Held, on appeal, reversing the decision of Gordon Smith, J.

(a) that a contentious suit had commenced as soon as appearance of the warning had been issued and that the Court had therefore no jurisdiction to grant Letters of Administration on the petition; and

(b) that the Court had moreover no jurisdiction to grant Letters of Administration in the absence of any evidence that the deceased left any estate in the Federated Malay States undisposed of.

Held, also, on the further submission (made for the first time in the Court of Appeal) that Rule 13 of the Rules for Contentious Business did not apply; that the petitioner's solicitors had waived any possible objection by asking for particulars of the caveator's interest after appearance; and that the point had no merit and, not having been raised in the Court below, ought not to be considered by the Court of Appeal.

Cases referred to:—

(1) *Re Barker* (1891) P. 251.

(2) *Sarup Dassin v. Hari Charan Dass* 16 I.C. 588.

(3) *Prasonno v. Ram Chandra Sighu* 17 I.C 155.

(4) *Man Singh v. Santi* 50 I.C. 964.

The facts are set out fully in the judgment of Gordon Smith J. below.

Gordon Smith Ag. J.A.—This was a Petition dated the 12th October, 1940, for the issue of Letters of Administration to the estate of the above-named deceased who died intestate on the 4th July, 1940, in India and against which a Caveat had been filed. I refer subsequently to her as "the deceased." The Petitioner, P. A. Mohideen Batcha, is the Attorney of R. E. M. Shaik Dawood aged 32, the only surviving son of the deceased.

The Caveator is Abdul Gaffoor, the attorney of the only surviving daughter, Fatimah Bee alias Batcha Ammal, aged 22.

The deceased also left her surviving a mother, brother and sister.

The dispute is closely concerned with the estate of the husband of the deceased, R. E. Mohamed Kassim, who died in 1931 and whose estate was worth over a million dollars. Matters in connection with this estate have also been before the Court and it is, perhaps, not inappropriate to mention the fact that Shaik Dawood, the deceased's son, R. A. Abdul Kadir, the deceased's brother, and Abdul Gaffoor the Caveator, are three of the four Executors who proved Mohamed Kassim's will, the two latter having been in his employment. The deceased was entitled to a 7/48th share of the estate of her husband Mohamed Kassim.

A previous Petition for Letters of Administration dated the 23rd July, 1940, by the same attorney came before Mr. Justice Cussen on the 30th September, 1940, but was struck out as being void ab initio as there was no power in his Power of Attorney to apply for Letters of Administration. At the hearing before me Counsel for the Petitioner omitted to produce his Power of Attorney but I assume, as no such point was taken by Counsel for the Caveator, that a fresh Power of Attorney had been obtained containing such due authority and my decision herein is subject to its production and verification on that point.

At the hearing before me, for the Petitioner, Counsel's submissions were three-fold:—

(a) That no proper Caveat had been entered by any person entitled to enter one.

(b) That even if a proper Caveat had been entered, then the Caveator had had all proper notice.

(c) That even if a proper Caveat existed and had been duly entered, then such did not prevent the Court from making an order in terms of the Petition and that there were no grounds for withholding the grant of Letters of Administration to the Petitioner.

On the first point, it is necessary to examine the Caveator's powers and authority to enter a Caveat and certain Powers of Attorney are relevant, as the Caveator is a substitute Attorney.

I will refer to Fatimah Bee, the daughter of deceased, as "the daughter" and to her Attorney (by substitution) Mohamed Abdullah, as the Caveator, and to Shaik Dawood, the son, and/or his Attorney Mohideen Batcha, as the Petitioner.

(A) The daughter executed the first Power of Attorney in India. It is dated the 3rd December 1936, and registered at Klang on the 20th February 1937 I would observe that it would appear from the Petition that the daughter was born in 1918 and therefore if resident in the Federated Malay States would, possibly not have attained her majority until 1939 so that at this time she might have been an infant.

There are various recitals to this Power of Attorney referring to her father Mohamed Kassim and his estate and to the fact that she was entitled to a 7/48th share of such estate. It appoints Abdul Gaffoor her Attorney for India, Malaya and Burma.

It is a full general Power of Attorney consisting of 26 clauses, including the power of substitution, and is in the general form.

(B) The daughter executed a second Power of Attorney in India dated the 23rd December 1936. It refers to the prior Power of Attorney and *ex abundante cautela* authorises the Attorney Abdul Gaffoor to act for her in the affairs of R. E. Mohamed Kassim Ltd. or other companies.

(C) The third Power of Attorney is dated the 5th August 1938, and is also of a like nature, and refers to the two previous Powers of Attorney.

These two additional Powers of Attorney are immaterial.

(D) The fourth Power of Attorney is dated the 20th June, 1940. It refers to the three previous Powers of Attorney and that they are still subsisting and again refers specifically to additional powers, and has various recitals.

These recitals refer to the deceased's share in Mohamed Kassim's estate. It then recites two Deeds of Gift by the deceased (her mother) dated the 6th March, 1940, and the 25th May, 1940, whereby the deceased gave all her interests in the estate of Mohamed Kassim to herself (the daughter) and to Hathija Beevi Ammal, the deceased's sister, in equal half shares. The power then goes on to authorise her attorney to deal with her such half share and in effect to include such half share as coming within the previous Power of Attorney.

(E) The last Power to which I need refer is the substitute power from Abdul Gaffoor to the Caveator (Mohamed Abdullah). It is dated the 10th July, 1940.

I might here observe that Abdul Gaffoor is the brother-in-law of the deceased, apparently having married Hathija Beevi Ammal to whom the deceased had just given a half share, as set out above.

There are various recitals to this Power of Attorney including a reference to the power to substitute in the original Power of Attorney (A), and under such he appoints the Caveator to do the acts therein specified. Although in terms it is not as full as the original Power, taking into consideration the recitals, it is in effect a full substituted power.

In my opinion the Caveator is by virtue of these powers and under these powers, authorised to file a Caveat or take any other proceedings or steps which his principal has authorised him to take and which he, the principal, could have done himself.

Re Barker[1] appears to be sufficient authority for this proposition.

The next point is, even if a Caveat has been properly and duly entered as I have just held, then it is submitted that the Caveator has had all proper notice.

Section 76 and section 77 of the Probate and Administration Enactment, Cap. 8, make the necessary provision for lodging Caveats.

In response to the Caveat so lodged, the Registrar issued his warning, to which the Caveator replied by entering an appearance.

Under Rule 65 of the Rules for non-contentious business (see page 36 of Vol. I, Rules under Enactments), upon entry of appearance, the matter should then be entered in the cause book and the contentious business shall then be held to commence. It does, not, however, seem to me that the Rules for contentious business (see page 53 — 78, *ib idem*) are applicable at this stage and I hold that a contentious suit has not yet commenced. I therefore deal with the matter on the Petition itself and, all parties being before me, I agree that the Caveator has had proper notice.

I therefore come to the last submission, namely that, assuming a good Caveat, there is nothing to prevent the Court from ordering a Grant of Letters of Administration to be issued in accordance with the Petition and that the Court should do so.

I can see no reason at all for disagreeing with this submission. The petitioner by his Attorney is the only son of the deceased and he is aged 32. He was also appointed to be an Executor by his father, who apparently by so doing had confidence in him. The only other next-of-kin are the daughter of the deceased and the deceased's mother, brother and sister. No reflections whatsoever against the son have been made before me and he is the proper and most suitable person to be granted Letters of Administration.

The Caveator, the daughter by her Attorney, is apparently only 22 and is not the most suitable person to have such a grant.

What the estate of the deceased now consists of I do not know nor do I know whether she had any estate other than what she was entitled to under her late husband's will and which latter she appears to have wholly disposed of by Deeds of Gift to her daughter and her sister, a few weeks prior to her death. The effect of these Deeds of Gift is to disinherit her son, the Petitioner, and I understand that he desires that Letters of Administration of his mother's estate should be granted to him in order that he might attack the validity of these Deeds of Gift.

Assuming that these Deeds of Gift are valid then, it would appear, there is very little (if any)

estate of the deceased to administer but if, on the other hand, they are invalid, then there would at least be some estate in which the daughter has an interest as on an intestacy.

The petitioner is certainly entitled to have a grant of Letters of Administration and is the proper person to whom such should be issued and such will issue to him in the ordinary way limited as is usual in the case of an attorney. Costs to come out of the Estate.

The Caveator appealed.

Roland Braddell (*R. Ramani* with him) for the appellant.

E. D. Shearn (*M. N. Cumarasami* with him) for the respondent.

Terrell Ag. C.J., F.M.S.—The petitioner is the only son of the deceased, and applied for letters of administration by his attorney P. A. Mohideen Batcha. The date of the petition is the 14th of October 1940. On the 22nd of October 1940 Batcha Ammal, a daughter of the deceased, filed a caveat by her attorney, A. Mohamed Abdullah, the latter being a substituted attorney under powers originally given in favour of one Abdul Gaffoor. The authority of the attorney to file a caveat was challenged in the Court below and again in the Court of Appeal. The learned trial Judge ruled that the authority was sufficient, and I will deal with this issue later.

On the 25th of October 1940 the caveator was duly warned in accordance with the rules entitled 'Non-contentious business' made under section 75 of the Courts Enactment (Gazette Notification No. 2179/16). On the 29th of October 1940 an appearance was entered by the Solicitors for the caveator in pursuance of the provisions of Rule 65, which reads as follows:—

> "Upon an appearance being entered in answer to the warning of a caveat, the matter shall be entered as a cause in the Court book, and the contentious business shall thereupon be held to commence, and the expenses of the entry of such caveat and the warning thereof shall upon taxation be considered as costs in the cause."

The learned trial Judge accepted the argument that under section 77 of the Probate & Administration Enactment (Cap. 8) he had power to make a grant of letters of administration notwithstanding the caveat and the appearance entered to the warning, provided that the caveator had received notice. He held that a contentious suit had not yet commenced.

On the appeal Mr. Braddell (for the caveator) argued that contentious business had commenced when an appearance had been entered under Rule 65, and that there was no jurisdiction to make a grant of letters of administration until the issues raised had been dealt with. He also argued that upon the admitted facts there was no estate, the only object of the petitioner in obtaining letters of administration being to bring a suit as administrator to set aside certain transfers of the deceased in favour of the caveator. It was contended therefore that on this ground also the Court had no jurisdiction, the petitioner having failed to show that the deceased had any property in the Federated Malay States, which is the basis of the jurisdiction conferred by section 67 of the Enactment. Mr. Shearn for the respondent again raised the extent of the attorney's authority to file a caveat. In addition to supporting the judgment of the Court below he also submitted that there had been no proper appearance, as the actual appearance entered did not comply with Rule 13 (Contentious business) at page 54 of volume I of Allen's Rules.

I will deal first with the respondent's submissions. First with regard to the power of attorney. The caveator had given altogether four powers of attorney in favour of Abdul Gaffoor. The recitals made it clear, inter alia, that the deceased was originally entitled to a 6/13 share in the business of R. E. Mohamed Kassim & Co., F.M.S., and had by deed of gift dated the 22nd of May 1940 transferred a moiety of such interest to the caveator. It was conceded in the Court of Appeal that the powers of attorney in favour of Abdul Gaffoor would have given him sufficient authority to file the caveat. It is argued, however, that the deed of substitution was more limited in its scope. It is true of course that the scope of general powers is limited by a subsequent grant of specific powers, but even so clause 4 of the deed of substitution seems sufficiently wide. It reads as follows:—

> "To commence, carry on, or defend all actions and other proceedings in Court to employ pleaders, vakils, attorneys, advocates etc., touching the estate and properties of R. E. Mohamed Kassim & Co., F.M.S. or any part thereof in my name or in the names of my principals and on my behalf and on behalf of my principals aforesaid."

It will be seen that the attorney on behalf of his principal, who was entitled to an interest in the business of R. E. Mohamed Kassim & Co., F.M.S., under the deed of gift, gives definite authority to the substitute to take any proceedings to protect such interest. The caveator does not wish to obtain letters

of administration to her mother's estate. In fact her whole case is that there is no estate. By opposing the grant of letters of administration to the petitioner, she is taking steps to protect her own interest in the business, and it appears to me that clause 4 completely covers the eventuality which has arisen. This submission therefore fails.

As regards the appearance, it is suggested that the appearance entered was not in the form prescribed by Rule 13 (volume I, page 54 of Allen's Rules). There are several answers to this objection. First of all, the appearance was entered in pursuance of Rule 65 of the non-contentious rules. Rule 13 applies to contentious business only, and no form is prescribed for an appearance under Rule 65. Secondly, it is not disputed that the petitioner's Solicitors asked for particulars of the caveator's interest, and were given the necessary information. They then set down the petition for hearing. If therefore there was any substance in the objection, it was waived. Thirdly, the point was not raised in the Court below, and is devoid of any merits whatever.

To deal with the substantive grounds of appeal, there seems to be no answer to the argument that under Rule 65, when once an appearance has been entered, the matter became contentious. It is true that Rules made under the Courts Enactment cannot supersede the provisions of the Probate and Administration Enactment, if they are inconsistent therewith, and it was held by the learned trial Judge that section 77 of the Enactment enabled the Court to make a grant of letters of administration even after a caveat had been filed, provided that the caveator had received notice. But the section does not say when contentious business commences. One must look to Rule 65 for that, and having ascertained when it commences, a point on which the Enactment is silent, section 85 comes into play and provides the procedure to be followed. From this latter section it is quite clear that no grant of letters of administration can be made until the contest has been decided. If section 77 has the meaning given to it by the learned trial Judge, the result would be that the Court being petitioned to grant letters of administration, and knowing that there was an objection, could nevertheless proceed to make the grant without having before it any evidence as to what the objection was.

I also think that the jurisdiction of the Court only arises under section 67 of the Enactment when there is some estate in the Federated Malay States to be administered. On the face of the petition, the only estate consists of certain interests, which the recitals in the powers of attorney (which were put in by the petitioner) show to have been transferred by deed of gift prior to the deceased's death. The petitioner as a son of the deceased and beneficially entitled to share in her property, if any, has sufficient interest to bring a suit to set aside the deeds of gift, if he is so advised. But until he has brought such a suit to a successful conclusion, there is no estate to be administered. The Court will certainly not assist the petitioner by making a prima facie decision that there is an estate to be administered, when that is an issue which should properly be decided in other proceedings. Such a ruling would appear to be in accordance with a long line of Indian authorities (see *Sarup Dassin v. Hari Charan Dass*[2]; *Prasonno v. Ram Chandra Sigha*[3]; and *Man Singh v. Santi*[4]).

In my opinion therefore, and on the facts before the learned trial Judge, there was no jurisdiction to make a grant of letters of administration in favour of the petitioner. The appeal must be allowed and the grant set aside. The appellant will be entitled to the costs of the appeal and of the hearing below. The costs of the petition itself will be costs in the cause. The deposit should be paid out to the appellant or her Solicitor. I see no ground for granting a certificate for two counsel, and such application is refused.

McElwaine C.J. S.S.: I agree.

Aitken Ag. J.A.: I agree.

Appeal Allowed.
Order Accordingly.

HAJI HUSSIN BIN HAJI MATSOM v. MAHERAN BINTI HAJI HOHAMED TAHIR.

[App. Civil Jurisdiction (Horne, J.) August 30, 1941]

Customary Tenure Enactment (Cap. 215), Section 4 — Distribution Enactment (Cap. 8), Section 179 — Decision by Collector that land is not occupied subject to custom — Subsequent distribution of acquired property of deceased in accordance with personal law of deceased — Distribution according to Adat.

The deceased, Mintan binti Haji Mohamed Tahir, died in 1932 leaving a husband (the appellant), a daughter who died seven months later and a sister of the full blood, Maheran (the respondent). The deceased